

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ULISES SUASTEGUI,

Defendant and Appellant.

D074215

(Super. Ct. No. SCD276658)

APPEAL from a judgment of the Superior Court of San Diego County, Polly H. Shamoon, Judge. Affirm.

Rachel Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Michael Pulos, Britton B. Lacy and Michael D. Butera, Deputy Attorneys General, for Plaintiff and Respondent.

Ulises Suastegui pleaded guilty to one count of vandalism under §400 (Pen. Code, § 594, subd. (a)(b)(2)(A))<sup>1</sup> with the further allegation that Suastegui was assisting a criminal street gang to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (d)). Suastegui appeals the electronic search condition of his probation sentence, contending that it is invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and unconstitutionally overbroad. The People refute both these claims, contending that the electronic search condition is reasonably related to Suastegui's future criminality and the condition is not overbroad, among other arguments. For reasons stated herein, we agree with the People and thus, affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

Between March 10 and April 10, 2018, Suastegui defaced a wall on Imperial Avenue with graffiti depicting "LHRS" which stands for the known criminal street gang Logan Heights Red Steps. Suastegui was charged with four counts of vandalism for the benefit of, at the direction of, and in association with a known criminal street gang with specific intent to promote, further, and assist in criminal conduct by the gang members under sections 594 and 186.22.

Suastegui entered a guilty plea to count three in exchange for probation and, if he successfully completed probation, reclassification of his charge to a misdemeanor.

Relevant here, Suastegui was sentenced to the following probation conditions: he agreed to submit to warrantless searches of his electronic and recordable devices,

---

<sup>1</sup> All future code section references are to the Penal Code.

including his cell phone; he could not use drugs or alcohol; and he could not associate with known gang members. Suastegui's counsel objected to the electronic search condition, claiming a "lack of nexus" to Suastegui's crime or future criminality. Suastegui timely appealed.

## DISCUSSION

Suastegui contends first that the electronic search probation condition is invalid under *Lent, supra*, 15 Cal.3d 481 and second, that it is unconstitutionally overbroad.

The People argue that the electronic search condition is reasonable under *Lent, supra*, 15 Cal.3d 481, and that Suastegui forfeited his constitutional overbreadth claim, but nevertheless, the probation condition is not unconstitutionally overbroad.

For reasons discussed *post*, we agree with the People and affirm the judgment.

### I

#### Lent Factors

##### A. Legal Principles

Probation is "an act of grace or clemency" courts may impose in place of imprisonment if the offender "poses minimal risk to public safety and [probation] promotes rehabilitation." (*People v. Moran* (2016) 1 Cal.5th 398, 402 (*Moran*).) While courts have broad discretion to grant probation, it is not unlimited. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) A probation condition " 'must serve a purpose specified in [section 1203.1]' " such as that it be " 'fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done

to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.' " (*Moran*, at pp. 402-403.)

Probation conditions are subject to an abuse of discretion standard of review. (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723 (*Appleton*).) Thus, a condition must be "reasonable under the circumstances." (*People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1177 (*Ebertowski*).)

A probation condition is invalid if the three conjunctive *Lent* factors are satisfied: the probation condition "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." (*Lent, supra*, 15 Cal.3d at p. 486.) Thus, if one factor is not satisfied, the condition is not invalid. (*Ibid.*)

Also, a probation condition is reasonable if it ensures "that a probationer complies with the terms of his or her probation and does not reoffend," by allowing a probation officer to "be able to properly supervise that probationer." (*People v. Olguin* (2008) 45 Cal.4th 375, 381 (*Olguin*).) Therefore, a condition that gives probation officers the ability to "determine not only whether [the probationer] disobeys the law, but also whether [the probationer] obeys the law" is reasonably aimed at deterring future criminality. (*Id.* at p. 382.)

Additionally, a probation condition can be "reasonably directed at curbing [the probationer's] future criminality by . . . helping him avoid any temptation of repeating his socially undesirable behavior." (*Moran, supra*, 1 Cal.5th at p. 404.) To this end, "[t]he primary focus of *Lent*'s third-prong [is] on the particular facts and circumstances of the

case before the court, rather than on establishing bright-line rules." (*People v. Trujillo* (2017) 15 Cal.App.5th 574, 584, review granted Nov. 29, 2017, S244650 (*Trujillo*).)

B. Analysis

Suastegui contends, and the People agree, that the electronic search condition satisfies the first and second *Lent* factors. However, the parties disagree whether the electronic search condition satisfies the third factor. Suastegui argues that the electronic search condition is not reasonably related to future criminality. In contrast, the People assert that the electronic search condition is reasonable given Suastegui's lengthy criminal record and because it allows probation officers to effectively supervise him to enforce other, unchallenged probation conditions. We agree with the People.

First, the electronic search condition is reasonable given Suastegui's lengthy criminal history that shows that he is a habitual reoffender. (*Olguin, supra*, 45 Cal.4th at p. 381.) The sentencing court, when imposing this condition, pointed to Suastegui's long criminal record, including a prior serious felony, an outstanding warrant at the time of the instant offense and multiple probation violations; his long history of drug and alcohol abuse with multiple failed court-ordered rehab programs; and his failure to contact his probation officer or appear for his probation interview in the instant case. In addition, the record makes clear that Suastegui is a habitual reoffender, who routinely disregards court orders, even after pleading guilty to a felony. The state has a strong interest in ensuring that Suastegui does not reoffend. Therefore, the electronic search condition is reasonable because it is aimed at future criminality.

Second, the electronic search condition is reasonable because it allows probation officers to ensure that Suastegui complies with another probation condition of this case: to not use drugs and alcohol. Warrantless searches of his electronic devices allow probation officers to check his communications, photos, and social media messages and posts to ensure that he does not obtain or use drugs and alcohol. Suastegui is under 21 so he cannot legally drink alcohol, and he has admitted to using illegal drugs like methamphetamine and marijuana. Furthermore, Suastegui has a long history of drug and alcohol abuse, including multiple failed court-ordered treatment programs. The state has a strong interest in rehabilitating him from his addiction instead of incarcerating him. Therefore, the electronic search condition facilitates effective supervision of Suastegui to ensure that he does not obtain, use, or abuse illegal drugs and alcohol and is successfully rehabilitated from a life as a drug addict.

Third, the electronic search condition is reasonable because it allows probation officers to ensure Suastegui does not associate with known gang members, another unchallenged probation condition. By supervising Suastegui's electronic devices, probation officers can verify that he is not communicating or in contact with known gang members. This, in turn, will help counter any temptation for Suastegui to commit more acts of vandalism at the behest of the gang. Therefore, this probation condition is reasonable because it facilitates enforcement of another one of Suastegui's probation conditions and helps reduce Suastegui's ability to communicate and associate with gang members.

For these reasons, the third *Lent* prong is not satisfied, and the electronic search probation condition is valid.

Nevertheless, relying heavily on *In re Erica R.* (2015) 240 Cal.App.4th 907 (*Erica R.*) and *In re J.B.* (2015) 242 Cal.App.4th 749 (*J.B.*), Suastegui contends that the electronic search condition is not reasonable. However, his reliance on these cases is misplaced.

*Erica R.* involved a juvenile who pleaded guilty to misdemeanor possession of Ecstasy and was granted probation subject to an electronic search condition based on the court's findings that "many minors, who are involved in drugs tend to post information about themselves and drug usage." (*Erica R.*, *supra*, 240 Cal.App.4th at p. 910.) The appellate court invalidated the electronic search condition under *Lent*, *supra*, 15 Cal.3d 481, finding that there was no connection in the record between anything in the juvenile's past offenses or social history, possession of Ecstasy, and future criminality, on the one hand, and electronic devices, on the other. (*Erica R.*, at pp. 912-915.)

*J.B.* concerned a juvenile who pleaded guilty to petty theft and was granted probation subject to an electronic search condition. (*J.B.*, *supra*, 242 Cal.App.4th at p. 752.) The court stated that electronic devices could be used to plan, execute, and sell stolen items and supervision would aid in enforcing another probation condition that prohibited drug use and would help keep him in school. (*Id.* at p. 753.) The appellate court nullified the electronic search condition because the sentencing court's rationale was speculative and there was nothing in the minor's offense, record, or history showing a link between electronic devices and future criminality. (*Id.* at pp. 754-756.)

Both of these cases involved juvenile offenders who pleaded guilty to misdemeanors and did not have lengthy criminal records, unlike Suastegui. Suastegui pleaded guilty to a felony as an adult and has a lengthy criminal record that includes a serious prior felony. Suastegui was on probation with an outstanding warrant when he committed the instant felony. Furthermore, Suastegui failed to call or answer his probation officer's calls to schedule a probation interview after pleading guilty to the crime at bar. As the court in *Erica R.* noted, "a defendant's history and circumstances" could reasonably connect an electronic search condition to future criminality. (*Erica R.*, *supra*, 240 Cal.App.4th at p. 914.) Therefore, as the severity of Suastegui's crime and lengthy history show, *Erica R.*, *supra*, 240 Cal.App.4th 907 and *J.B.*, *supra*, 242 Cal.App.4th 749 are distinguishable.

Finally, citing *People v. Burton* (1981) 117 Cal.App.3d 382 and *In re Martinez* (1978) 86 Cal.App.3d 577, Suastegui contends that there must be a "nexus," supported by a "rational factual basis," showing the possibility of future criminality and a relationship to the probation condition at issue. However, both these cases predate *Olguin*, which repudiated such tests in favor of a simple reasonableness standard. (*Olguin*, *supra*, 45 Cal.4th at pp. 383-384 ["the relevant test is *reasonableness*"].) Thus, Suastegui's argument is unpersuasive.



## II

### Constitutional Overbreadth

#### A. Legal Principles

Adult probationers may, in accepting probation in place of incarceration, validly "consent to limitations upon their constitutional rights—as, for example, when they agree to warrantless search conditions." (*Olguin, supra*, 45 Cal.4th at p. 384.) However, a probation condition that limits constitutional rights must be closely tailored "to the purpose of the condition" to avoid being invalidated as overbroad. (*Appleton, supra*, 245 Cal.App.4th at p. 723.) While "perfection in such matters is impossible, and . . . practical necessity will justify some infringement," the primary concern in an overbreadth challenge is the "closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights." (*Ibid.*)

The standard of review for "constitutional challenges to probation conditions [is] de novo."<sup>2</sup> (*Nachbar, supra*, 3 Cal.App.5th at p. 1128, rev.gr.)

---

<sup>2</sup> This opinion follows the precedents of this court *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted December 14, 2016, S238210 (*Nachbar*) and *Trujillo, supra*, 15 Cal.App.5th 574 while acknowledging that the California Supreme Court has granted review of numerous cases involving a similar electronic search probation condition. (See *Nachbar, supra*, 3 Cal.App.5th 1122, review granted; *People v. Valdivia* (2017) 16 Cal.App.5th 1130, review granted Feb. 14, 2018, S245893; *Trujillo, supra*, 15 Cal.App.5th 574, review granted; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628; *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923.)

The People argue that Suastegui forfeited his constitutional claim by failing to object on constitutional grounds at sentencing.

Forfeiture occurs when "a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court . . . forfeit[s] his or her right to raise the claim on appeal." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880.) " 'The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.' " (*Id.* at p. 881.) If forfeited, an appellant may bring a " 'facial challenge'—that phrasing or language of a probation condition is unconstitutionally . . . overbroad because, for example, of the absence of a requirement of knowledge," that only "requires the review of abstract and generalized legal concepts" for the first time on appeal. (*Id.* at p. 885.) Appellate courts may only decide abstract and generalize legal concepts "if the question can be resolved as a matter of law without reference to the sentencing record." (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1345.) Additionally, courts should adhere to a policy of judicial self-restraint and not decide constitutional question if a "judgment can be upheld on alternative, non-constitutional grounds." (*California Teachers Assn. v. Board of Trustees* (1977) 70 Cal.App.3d 431, 442.)

## B. Analysis

Suastegui contends that the electronic search condition is unconstitutionally overbroad because it allows for a "blanket" limitless search that violates his Fourth Amendment right to privacy. The People contend that Suastegui forfeited this claim when he failed to object to the electronic search condition on constitutional grounds at the

trial court. The People also contend that, regardless of forfeiture, Suastegui waived his Fourth Amendment rights by consenting to the warrantless electronic search condition and that overbreadth only applies in a First Amendment<sup>3</sup> context so Suastegui's claim is not proper here. As we discuss, we agree with the People regarding the Fourth Amendment discussion.

Suastegui forfeited his "as applied" claim of constitutional overbreadth when he did not object to the electronic search condition on constitutional grounds at sentencing. It is undisputed that Suastegui failed to object to the electronic search condition on constitutional grounds at the trial court. Thus, Suastegui may only raise an overbreadth challenge on appeal if he presents a pure question of law. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 880.)

Suastegui contends that he presents a pure question of law by stating that he "has not raised an 'as applied' constitutional challenge" but "that the needs of probationary supervision could never be 'reasonable' under the Fourth Amendment." While it is unclear what Suastegui means by "probationary supervision," he does not adequately show why the electronic search condition is facially unconstitutional. His statement that "[a]ny probation condition that allows a blanket search of a probationer's electronic devices, like the condition here, significantly impinges upon his or her constitutional right to privacy under the Fourth Amendment" is simply a conclusion without supporting

---

<sup>3</sup> As we affirm the judgment on the enumerated grounds, we find no occasion to address the People's other arguments: (1) that overbreadth only applies to First Amendment claims and (2) the condition is reasonable given the "special needs" of California's probation system.

evidence. Suastegui continues: "[a]s worded, the scope of the search is extremely broad—indeed it is limitless" and "[a]ppellant maintains that because of the fundamental nature of electronic searches, an electronics search condition cannot be narrowly tailored." However, Suastegui fails to show why the condition violates Fourth Amendment rights generally or how the wording of the condition renders it overbroad. Without support for his general conclusions, Suastegui's facial constitutional challenge fails.

Furthermore, Suastegui supports his claims of constitutional overbreadth with evidence from the record and his history, rendering these arguments an as applied challenge. For example, Suastegui argues that the electronic search condition "impinges upon his Fourth Amendment privacy rights and is not narrowly tailored to advance the state's interest in rehabilitating him from him offense," and even his headings indicate that this condition "impinges on Mr. Suastegui's right to privacy." Suastegui tries to distinguish his case, arguing that "[u]nlike the defendant in *J.E.* [(2016) 1 Cal.App.5th 795], appellant is not a minor, and does not have serious behavioral, family, or substance abuse problems. Appellant was convicted of spraying graffiti for the benefit of a gang. *Ebertowski's* [228 Cal.App.4th 1170] holding that a hardened criminal gang member with a history of violence requires intensive supervision while on probation does not apply to the facts here." These references to the particular facts of his case make Suastegui's argument an "as applied" challenge. Thus, this argument is forfeited for Suastegui's failure to object at the trial court.

Regardless of forfeiture, this court has already addressed this issue and concluded that there was no constitutional violation, and thus, Suastegui's arguments fail on the merits as well.

DISPOSITON

The judgment is affirmed.

HUFFMAN, Acting P. J.

I CONCUR:

IRION, J.

I CONCUR IN THE RESULT:

AARON, J.